Supreme Court, U.S.
FILED

951672 FEB 14 1996

OFFICE OF THE CLERK

Case No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, Respondents

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Peter Tannenwald, Esq.
Counsel of Record
Irwin, Campbell & Tannenwald
1730 Rhode Island Ave., N.W.
Suite 200
Washington, D.C. 20036
202-728-0400

QUESTIONS PRESENTED FOR REVIEW

Whether the actions of the Federal Communications Commission in revoking the construction permit of Black Television Workshop of Los Angeles, Inc. are subject to the automatic stay provisions of the Federal Bankruptcy Code, pursuant to 11 U.S.C. Section 362 (a), or are otherwise subject to stay pursuant to 11 U.S.C. Section 105 (a); and

Whether the ruling of the D.C. Circuit, in question, in not staying the revocation of the permit of Black Television Workshop, is in conflict with the policies of the FCC, in conflict with prior decisions of the D.C. Circuit, in conflict with decisions of other circuits, in conflict with precedent of the U.S. Supreme Court, and in conflict with the Congressional legislative history underlying the Federal Bankruptcy Code, thus requiring remand to the FCC, in order for the U.S. Bankruptcy Court, which has jurisdiction over the assets of Black Television Workshop, including the construction permit granted to it by the FCC, to implement the policies of the Federal Bankruptcy Code protecting creditors?

PARTIES TO THE PROCEEDING

The following persons were also parties to the appeal before the United States Court of Appeals for the D.C. Circuit whose orders and rulings are sought to be reviewed:

Rosa Ware
Booker T. Wade, Jr.
Gwendolyn May
Hope Smith Bynum
Mary V. Woodfork

Black Television Workshop of Los Angeles, Inc. is a California non-profit and non-stock corporation, which was incorporated in 1981. It is governed by a multi-member board of directors. The corporation is not publicly owned, nor is it affiliated with any other entity. It has no parent company or subsidiaries. No debt securities have been publicly issued. The sole activity of the corporation is to engage in television broadcasting. On October 3, 1994, the corporation filed for bankruptcy protection in the Federal Bankruptcy Court for the Central District of California. On February 23, 1995, the case was converted to Chapter 7 and Arnold L. Kupetz, Esq. was named Trustee (Case No. SV 94-45938KL).

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS . . . . . iii-iv

TABLE OF AUTHORITIES . . . . . v-vii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION . . . 7

The petition for writ of certiorari raises an important Federal question of law as to whether the actions of the Federal Communications Commission in revoking a construction permit are subject to the automatic stay provisions of the Federal Bankruptcy Code, pursuant to 11 U.S.C. Section 362 (a), or are otherwise subject to stay pursuant to 11 U.S.C. Section 105 (a), and whether the ruling of the D.C. Circuit, in question, is in conflict with the policies of the FCC, in conflict with prior decisions of

the D.C. Circuit, in conflict with decisions of other circuits, in conflict with precedent of this Court, and in conflict with the Congressional legislative history underlying the Federal Bankruptcy Code.

CONCLUSION 14

APPENDIX A 1a

APPENDIX B 4a

APPENDIX C 5a

APPENDIX D 9a

APPENDIX E 10a

APPENDIX F 11a

APPENDIX G 12a

APPENDIX H 19a

APPENDIX I 21a

APPENDIX J 22a

APPENDIX K 24a

TABLE OF AUTHORITIES

Page(s)

FCC Decisions

New South Broadcasting, Inc., 8 FCC Rcd 1272 (1993), 6 FCC Rcd 5047 (1991) 11

Second Thursday Corporation, 22 FCC2d 515 (1970), recon. granted, 25 FCC2d 112 (1970) . . 11

Walter S. Kelly, Trustee, 9 FCC Rcd 1923 (MMB 1994) 11

Federal Court Decisions

Board of Governors of the Federal Reserve System of the U.S.v. MCorp Financial, Inc., 502 U.S. 32 (1991) 12-13

Fugazy Express, Inc., 114 B.R. 865 (Bk. S.D.N.Y. 1990), 124 B.R. 426 (S.D.N.Y. 1991), appeal dismissed, 962 F.2d 769 (2nd Cir. 1992) 9-11

In Re: Stucka, 77 B.R. 777 (Bk. C.D. Calif. 1987) 12

LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974) 11

L.B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948) 8

Page(s)

NLRB v. Continental Hagen Corp., 932 F.2d 828 (9th Cir. 1991) 12

NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986) 10

State of Missouri v. U.S. Bankruptcy Court, 647 F.2d 768 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982) 8, 10, 12

Statutes

11 U.S.C. 105 (a) 2, 7, 10, 14

11 U.S.C. 362 (a) and (b) 2, 7, 9, 12-13

47 U.S.C. Section 301 . . . . . 2, 8

Congressional Record

124 Cong. Rec. H 11,089 (Sept. 28, 1978) 10

124 Cong. Rec. H 11,092 (Sept. 28, 1978) 9

124 Cong. Rec. S 17,409 (Oct. 6, 1978) 9

Page(s)

Opinions and Orders in the Proceeding
(Chronological Order)

Initial Decision of ALJ Walter C. Miller,
FCC 83D-13, rel. Feb. 24, 1983 . . . . . 3, 8

Hearing Designation Order ("HDO"),
3 FCC Rcd 5443 (1988) 3

Initial Decision of ALJ Joseph Chachkin,
7 FCC Rcd 7819 (1992) 3-4

Decision, 8 FCC Rcd 4192 (1993) 4

Memorandum Opinion and Order,
8 FCC Rcd 8719 (1993) 4

Order, 9 FCC Rcd 4477 (1994) 4

Order, Case No. 94-1031 and Consolidated
Case No. 94-1655, D.C. Circuit,
filed Dec. 5, 1994 . . . . . 2, 5

Order, D.C. Circuit, filed March 17, 1995 . . . 2, 5

Judgment, D.C. Circuit, filed Sept. 18, 1995 . . 2, 5

Orders, D.C. Circuit, filed Nov. 17, 1995 . . . . 2, 6

Case No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, Respondents

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The interlocutory order, final judgment, and orders on rehearing and hearing in banc of the U.S. Court of Appeals for the D.C. Circuit denying the relief requested by the petitioners are cited in the Table of Authorities and are included in the Appendix. The orders and judgment of the D.C. Circuit are unreported.

JURISDICTION

The D.C. Circuit entered an interlocutory order denying a motion to remand on December 5, 1994. A petition for rehearing and suggestion for hearing in banc as to the motion to remand was denied on March 17, 1995. A final judgment in the case was entered on September 18, 1995. The petitioners' motion for substitution of parties, motion to remand, and petition for rehearing and suggestion for hearing in banc was denied on November 17, 1995 (Case No. 94-1031 and Consolidated Case No. 94-1655). The jurisdiction of this Court is timely invoked under 28 U.S.C. Section 1254 (1). By letter of February 15, 1996, the Clerk of this Court granted petitioners' leave to refile their brief by April 15, 1996. The Solicitor General and the FCC have been served with this petition for writ.

STATUTORY PROVISIONS

11 U.S.C. 105 (a)

11 U.S.C. Section 362 (a) and (b)

47 U.S.C. Section 301

STATEMENT OF THE CASE

In 1983, the Federal Communications Commission ("FCC") granted to Black Television Workshop of Los Angeles, Inc. ("Workshop"), as a corporation, a construction permit for non-commercial television channel 68 in Los Angeles. Initial Decision of ALJ Walter C. Miller, FCC 83D-13, rel. Feb. 24, 1983. Workshop is a California chartered non-stock and non-profit corporation which is governed by a multi-member board of directors. All of the directors are African-Americans (App. G, pp. 13a, 15a, 18a).

In Hearing Designation Order ("HDO"), 3 FCC Rcd 5443 (1988), the FCC designated for revocation the construction permit of the corporation. The HDO was based upon a purported unauthorized transfer of control and/or unauthorized control of the corporation because of a change and/or deletion of directors of the corporation without prior FCC approval. The HDO also raised unspecified issues of misrepresentation and/or lack of candor by persons who were current or former directors of the corporation, or who had served as corporate counsel.

The Initial Decision of ALJ Joseph Chachkin ("Initial Decision"), 7 FCC Rcd 7819, 7833-7834 (1992) revoked the construction permit of the corporation. In Decision, 8 FCC Rcd 4192 (1993); Memorandum Opinion and Order, 8 FCC Rcd 8719 (1993); and Order,

9 FCC Rcd 4477 (1994), the FCC affirmed the Initial Decision. Therein, it issued a final agency decision revoking the permit of the corporation.

An appeal of the revocation was filed by current directors of the corporation with the U.S. Court of Appeals for the District of Columbia Circuit on October 3, 1994 (Case No. 94-1655). A separate appeal was filed by Mary V. Woodfork, a former director of the corporation, who was personally disqualified (Case No. 94-1031). The jurisdiction of the D.C. Circuit was pursuant to 47 U.S.C. Section 402 (b)(1), (5), and (6), and 28 U.S.C. 2342 (1).

On October 3, 1994, Workshop, as a corporate entity, filed for bankruptcy protection in the United States Bankruptcy Court for the Central District of California, Los Angeles (Case No. SV 94-45938KL), pursuant to Chapter 11 of the Federal Bankruptcy Code. On February 23, 1995, the case was converted to Chapter 7. Arnold L. Kupetz, Esq., was appointed Trustee (App. H, pp. 19a-20a).

Workshop, through its current directors, filed with the D.C. Circuit a motion to remand. Therein, it requested that the case, with respect to the corporation, be remanded to the FCC to allow the U.S. Bankruptcy Court to take jurisdiction, pursuant to an automatic stay, in order to protect the creditors of the corporation. The FCC opposed the motion to remand. It disputed the

applicability of the automatic stay and the jurisdiction of the U.S. Bankruptcy Court.

In Order, Case No. 94-1031 and Consolidated Case No. 94-1655, filed December 5, 1994, the D.C. Circuit held that the actions of the FCC in revoking a license or construction permit are excepted from the automatic stay provisions of the Federal Bankruptcy Code, 11 U.S.C. Section 362 (b)(4) and (5). No explanation or rationale was given. The decision was not published (App. A, p. 2a).

A petition for rehearing and suggestion for hearing in banc was filed with respect to the motion to remand. This petition was denied by the D.C. Circuit in Order, Case No. 94-1031 and Consolidated Case No. 94-1655, filed March 17, 1995. No explanation or rationale was given. The order was not published (App. B, p. 4a).

In Judgment, Case No. 94-1031 and Consolidated Case No. 94-1655, filed September 18, 1995, the D.C. Circuit affirmed the revocation of the construction permit of Workshop and affirmed the personal disqualification of Woodfork, along with other named parties, who are current or former directors of the corporation. The explanation or rationale given was that there is "ample evidence on the record to support the FCC's decisions." The Judgment was not published (App. C, pp. 5a-8a).

Arnold L. Kupetz, Trustee in Bankruptcy, filed a motion for substitution of parties and for remand. Therein, the Trustee requested that he be substituted for the corporation as a party in view of his appointment as Trustee in Bankruptcy. Moreover, the Trustee requested that the proceeding be remanded to the FCC with respect to the corporation in order to allow the U.S. Bankruptcy Court to assume jurisdiction to protect the creditors of the corporation.

A petition for rehearing and suggestion for hearing in banc with respect to the Judgment was filed by the corporation and by the current directors. In separate Orders, Case No. 94-1031 and Consolidated Case No. 94-1655, filed November 17, 1995, the D.C Circuit denied the motion of the Trustee and the petition for rehearing and suggestion for hearing in banc. According to the D.C. Circuit, the issues raised by the Trustee had previously been decided (App. D, p. 9a). No explanation or rationale was given for denial of the petition for rehearing and the suggestion for hearing in banc (App. E and F, pp. 10a-11a). The orders were not published.

REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari raises an important Federal question of law as to whether the actions of the FCC in revoking a construction permit or license are subject to the automatic stay provisions of the Federal Bankruptcy Code, pursuant to 11 U.S.C. Section 362 (a), or are otherwise subject to stay pursuant to 11 U.S.C. Section 105 (a), and whether the ruling of the D.C. Circuit, in question, is in conflict with the policies of the FCC, in conflict with prior decisions of the D.C. Circuit, in conflict with decisions of other circuits, in conflict with precedent of this Court, and in conflict with the Congressional legislative history underlying the Federal Bankruptcy Code.

The petition for writ of certiorari raises an important Federal question of law as to whether the actions of the FCC in revoking the construction permit of Black Television Workshop of Los Angeles, Inc. are subject to the automatic stay provisions of the Federal Bankruptcy Code, pursuant to 11 U.S.C. Section 362 (a), or are otherwise subject to stay pursuant to 11 U.S.C. 105 (a), and whether the ruling of the D.C. Circuit, in question, is in conflict with the policies of the FCC, in conflict with prior decisions of the D.C. Circuit, in conflict with decisions of other circuits, in conflict with precedent of this Court, and in conflict

with the Congressional legislative history underlying the Federal Bankruptcy Code. The *D*.C. Circuit declined to give an explanation or rationale for its ruling.

The question as to whether an automatic stay applies to an FCC permit or license revocation action has a substantial impact on the telecommunications and media industry and thus requires a consistent application of the law. A number of FCC regulated businesses, such as broadcast stations, file for Federal bankruptcy protection.

The Communications Act, 47 U.S.C. Section 301, creates a limited property right in a construction permit (App. K, p. 24a). It is a "thing" of value and becomes property of the debtor estate at the time of filing of the bankruptcy petition. L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C. Cir. 1948); State of Missouri v. U.S. Bankruptcy Court, 647 F.2d 768, 774 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982). The construction permit, in question, was issued by the FCC to Workshop, as a corporate entity. Initial Decision of ALJ Walter C. Miller, FCC 83D-13 (App. G, p. 15a, 18a).

The FCC permit or license is in almost all cases the most valuable asset of a broadcaster debtor estate. In situations where there is a permit or license revocation action by the FCC, a stay of that action must be effectuated in order for the bankruptcy courts to

protect creditors.

The Congressional legislative history underlying the Federal Bankruptcy Code states that an automatic stay is to apply to actions of Federal agencies, unless the stay would threaten public health or safety, or interfere with enforcement of that agency's police or regulatory powers. Fugazy Express, Inc., 114 B.R. 865, 873 (Bk. S.D.N.Y. 1990), 124 B.R. 426, 431 (S.D.N.Y 1991), appeal dismissed, 962 F.2d 769 (2nd Cir. 1992), citing 124 Cong. Rec. H 11,092 (Sept. 28, 1978); 124 Cong. Rec. S 17,409 (Oct. 6, 1978). See also, 11 U.S.C. Section 362 (a)(1), (2), and (3) of the Federal Bankruptcy Code, which provides for a stay of governmental actions and proceedings against the debtor estate, including judicial or administrative actions (App. J, p. 22a).

The exemption to a stay in order for a governmental agency to enforce its police or regulatory powers is codified in 11 U.S.C. Section 362 (b)(4) and (5) (App. J, p. 23a). However, as noted in the Congressional legislative history, that exception is to be read narrowly so as to permit an agency only to protect public health and safety and not to protect its pecuniary interest in the permit or license. Fugazy Express, Inc., 124 B.R. at 431.

The term "police or regulatory power" refers to the enforcement of laws affecting health, welfare,

morals, and safety, but not regulatory laws that directly conflict with control of the res or property by the bankruptcy court. State of Missouri v. U.S. Bankruptcy Court, 647 F.2d at 776, citing 124 Cong. Rec. H 11,089 (Sept. 28, 1978). The FCC's revocation of the construction permit of Workshop directly conflicts with control of the property of the debtor estate by the U.S. Bankruptcy Court. The FCC has already adjudicated the issues of violation of its rules and thus has exercised its police powers. Deprivation of the rights of creditors does not further the exercise of the FCC's police powers.

Accordingly, there is no exemption to the stay under the Federal Bankruptcy Code for FCC revocation actions. Thus, the permit of Workshop could not be revoked without the permission of the U.S. Bankruptcy Court, which has jurisdiction over the debtor corporation and its estate. Fugazy Express, Inc., 114 B.R. at 873; 124 B.R. at 431.

In other circuits, the Courts have held that the automatic stay does not apply to some Federal agencies. Nevertheless, bankruptcy courts are permitted, pursuant to 11 U.S.C. Section 105 (a), to stay actions of Federal agencies which threaten property of the debtor estate (App. I, p. 21a). NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 941 (6th Cir. 1986). The revocation action of the FCC threatens the permit of Workshop, which is property of the debtor estate.

The policy of the FCC is to concur with a stay of its revocation actions and to defer to the jurisdiction of the bankruptcy courts. This is done in order to protect creditors so long as alleged or adjudicated FCC wrongdoers are not unduly benefitted. Second Thursday Corporation, 22 FCC2d 515 (1970), recon. granted, 25 FCC2d 112 (1970).

A stay of a revocation action is consistent with FCC policy even in situations of egregious misconduct by a broadcast licensee, such as a Federal felony conviction for drug dealing, which otherwise would mandate revocation of the broadcast license. Walter S. Kelly, Trustee, 9 FCC Rcd 1923 (MMB 1994); New South Broadcasting, Inc., 8 FCC Rcd 1272 (1993), 6 FCC Rcd 5047 (1991). Because wrongdoers are not to benefit, such deferral to bankruptcy courts does not eviscerate or nullify the FCC's police powers and enforcement authority over broadcast stations.

The D.C. Circuit has heretofore upheld the FCC's policy of deferring to the jurisdiction of bankruptcy courts and has mandated the FCC to do so. LaRose v. FCC, 494 F.2d 1145, 1150 (D.C. Cir. 1974). As previously noted, in the Second Circuit, the bankruptcy courts have explicitly held that the automatic stay provisions apply to permit or license revocation actions by the FCC. Fugazy Express, Inc., 114 B.R. at 873; 124 B.R. at 431.

A stay of the FCC's revocation action is in accord with precedent in the Ninth Circuit, which has jurisdiction over the bankruptcy proceeding of Workshop. The filing of the bankruptcy petition automatically stays all actions against the debtor estate. In Re: Stucka, 77 B.R. 777, 782 (Bk. C.D. Calif. 1987). That stay may be lifted only to allow entry by the FCC of a judgment against Workshop as to rule violations, but not to allow enforcement by the FCC of a final judgment which would be detrimental to creditors. NLRB v. Continental Hagen Corp., 932 F.2d 828, 832 (9th Cir. 1991).

The FCC has already entered a judgment against Workshop as to certain rule violations and now seeks to enforce a final judgment by revoking its construction permit. However, the permit is the only source of funds for the creditors of the corporation. Thus, enforcement of the FCC's judgment is clearly detrimental to the creditors. State of Missouri, 647 F.2d at 776, automatic stay applies against actions of government agency seeking to protect its pecuniary interest, rather than to protect public safety or health.

Application of the automatic stay provisions of 11 U.S.C. Section 362 (a)(1), (2), and (3) to revocation actions of the FCC is in accord with the Court's holding in Board of Governors of the Federal Reserve System of the U.S. v. MCorp Financial, Inc., 502 U.S. 32, 41 (1991). Therein, the Court held that only certain

ongoing administrative hearings and agency actions to enforce cease and desist orders are excepted from the automatic stay provisions of 11 U.S.C. Section 362 (a) (App. J, p. 22a).

The Court explicitly excluded from its holding in MCorp judicial appeals of final agency actions which would adversely affect the license of a regulated business that has filed for Federal bankruptcy protection. The Court stated that if the administrative hearing or action results in a final agency order adversely affecting the license of the regulated business which has filed for Federal bankruptcy protection and if a judicial appeal of that final agency action is taken, then "it may well be proper" for a bankruptcy court to exercise its jurisdiction over the property of the debtor estate, including the government license. MCorp, 41.

This is the situation of Workshop. It was not involved in an ongoing administrative hearing or cease and desist action by the FCC, but rather was appealing a final agency order revoking its permit. Revocation is clearly detrimental to creditors since the permit is the only source of funds for payment to them.

Accordingly, the revocation of the construction permit of Workshop, a corporation which has filed for Federal bankruptcy protection, is subject to the automatic stay provisions of 11 U.S.C. Section 362 (a)(1), (2), and (3), which stays the action of the FCC

in revoking its permit (App. J, p. 22a). The FCC's actions are otherwise subject to stay pursuant to 11 U.S.C. Section 105 (a) (App. I, p. 21a). A stay would allow the Federal bankruptcy proceeding to go forward to protect creditors. Thus, a grant of certiorari and remand of the case to the FCC is requested in order for the U.S. Bankruptcy Court to exercise its proper jurisdiction and authority over the assets of the debtor estate, which include the construction permit granted by the FCC in 1983 to Workshop.

CONCLUSION

WHEREFORE, in view of the foregoing, the Court is requested to grant certiorari and review this case because of the conflicts in the lower courts and the conflict with Court precedent as to the Federal bankruptcy issue raised on appeal --- the applicability of an automatic stay, or other stay, to revocation actions of the FCC.

Respectfully submitted,

By:_____

Peter Tannenwald, Esq.
Counsel of Record
Irwin, Campbell & Tannenwald
1730 Rhode Island Ave., N.W.,
Suite 200
Washington, D.C. 20036-3101
Tel. 202-728-0400

Counsel for Arnold L. Kupetz,
Trustee in Bankruptcy

April 15, 1996

APPENDIX

APPENDIX A -- ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, FILED DECEMBER 5, 1994

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1031 September Term, 1994

Mary V. Woodfork,
Appellant,

v.

Federal Communications Commission,
Appellee,
Booker T. Wade, Jr.; Rosa Ware;
Gwendolyn May; Hope Smith Bynum,
Intervenors.

94-1655

Black Television Workshop of Los Angeles, Inc.; Rosa Ware;
Booker T. Wade; Gwendolyn May;
Hope Smith Bynum,
Appellants,

v.

Federal Communications Commission,
Appellee,

APPENDIX A

Mary V. Woodfork,
Intervenor

BEFORE: Williams, Sentelle, and Rogers, Circuit Judges

ORDER

Upon consideration of the motion to consolidate, the motions for summary reversal, the opposition thereto and the replies; the motion for remand, the opposition thereto and the reply; the motion to defer briefing schedule, and the response thereto; and the motion for leave to file a motion for summary affirmance, the oppositions thereto, and the replies, it is

ORDERED that the motions for summary reversal be denied. The merits of the parties, positions are not so clear as to warrant summary action. See Cascade Broadcasting Group, Ltd. v.FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the motion for remand be denied. The Federal Communications Commission's action is excepted from the automatic stay provisions of the bankruptcy code. 11 U.S.C. § 362(b)(4). It is

APPENDIX A

FURTHER ORDERED that the motion for leave to file a motion for summary affirmance be denied. Movants have not justified their failure to file within the time set by the court's initial scheduling order filed January 27, 1994. It is

FURTHER ORDERED that the order filed October 6, 1994, establishing a briefing schedule and setting an argument date in No. 94-1031 be vacated. It is

FURTHER ORDERED that the motion to defer briefing schedule be dismissed as moot. It is

FURTHER ORDERED that the motion to consolidate No. 94-1031 with No. 94-1655 be granted.

The Clerk is directed to calendar the consolidated appeals for argument.

Per Curiam

FOR THE COURT:
Ron Garvin, Clerk
By: Cheri Carter, Deputy Clerk

APPENDIX B -- ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, FILED MARCH 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1031 September Term, 1994

Mary V. Woodfork,
Appellant,
v.
Federal Communications Commission,
Appellee

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellants' Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT: Robert A. Bonner, Deputy Clerk

APPENDIX C -- JUDGMENT OF THE U.S COURT OF APPEALS FOR THE D.C. CIRCUIT, FILED SEPTEMBER 18, 1995

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1031 September Term, 1995

Mary V. Woodfork,
Appellant,
v.
Federal Communications Commission,
Appellee

Booker T. Wade, Jr., et al.,
Intervenors

Consolidated with No. 94-1655

Appeals of an Order of the
Federal Communications Commission
Before WILLIAMS, GINSBURG and RANDOLPH
Circuit Judges.

APPENDIX C

JUDGMENT

This case involves two consolidated appeals from a decision of the Federal Communications Commission to revoke the construction permit of Black Television Workshop of Los Angeles, Inc. ("BTW") for noncommercial educational UHF television station KEEF-TV, Channel 68, in Los Angeles, California. *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd 4192, *recon. denied*, 8 FCC Rcd 8719 (1993), *further recon. dismissed*, FCC 94I-013 (Feb. 15, 1994), *review denied*, 9 FCC Rcd 4477 (1994). These appeals were considered on the record from the FCC, on the briefs submitted by counsel, on oral argument, and on a statement for the record submitted by appellant BTW after oral argument. *See* D.C. Cir. Rule 28(g). After full review, the Court is satisfied that appropriate disposition of the appeals does not warrant an opinion. *See* D.C. Cir. Rule 36(b).

Appellants BTW and Rosa W. Ware, Booker T. Wade, Jr., Gwendolyn May, and Hope Smith Bynum ("Wade Group") contend that the FCC erroneously revoked BTW's construction permit and erroneously disqualified members of the Wade Group from inheriting it. Appellant Mary Woodfork contends that the FCC lacked sufficient record evidence on which to disqualify her from inheriting the permit. We find ample evidence on the record to support the FCC's

decisions with respect to all of these claims. *See Black Television Workshop of Los Angeles, Inc.*, 7 FCC Rcd 7819 (ALJ 1992).

Appellant Woodfork also contends that the FCC failed to respond to her claim that she was entitled to the application of an FCC policy excusing clients from the bizarre and unforeseeable conduct of their attorneys. While the FCC's treatment of appellant's contention is indeed condensed and of less than ideal clarity, 8 FCC Rcd. at 4200 n. 51, we will uphold such treatment if we can discern a "reasoned path from the facts and considerations before the Commission to the decision it reached." *Russian River Vintage Broadcasting v. FCC*, 5 F.3d 1518, 1521 (D.C. Cir. 1993), quoting *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984). *See also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-6 (1974), *reh. denied*, 420 U.S. 956 (1975). We find that a reasoned path does exist from the facts before the Commission to the dismissal of appellant's argument; appellant had significant warning signs rendering her attorney's behavior foreseeable long before her repudiation of him in late 1986. For example, appellant states that her attorney had her sign a blank ownership report in early 1985; she believed he falsely represented himself to be a BTW officer in her presence in 1985; she was never given a copy of BTW's purported by-laws - through which her attorney was orchestrating the

dismissal of BTW board members--after repeated requests in 1983. These facts set appellant's case well afield of FCC exceptions to its general policy that applicants are bound by counsel's actions. *Pontchartrain Broadcasting Co., Inc.*, 7 FCC Rcd 1898, 1903 (Rev. Bd. 1992), *review denied*, 8 FCC 2256 (1993), *aff'd*, 15 F.3d 183 (D.C. Cir. 1994).

Accordingly it is,

ORDERED and ADJUDGED, by the Court, that in No. 94-1655 and No. 94-1031 the decision by the FCC is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely-filed petition for rehearing. *See* D.C. Cir. Rule 41(a).

FOR THE COURT:

Mark J. Langer, Clerk

BY: Deputy Clerk

APPENDIX D -- ORDER OF THE U.S COURT OF APPEALS FOR THE D.C. CIRCUIT, FILED NOVEMBER 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1031 September Term, 1995

Mary V. Woodfork,
Appellant,
v.
Federal Communications Commission,
Appellee

and Consolidated Case 95-1655

BEFORE: Williams, Ginsburg and Randolph, Circuit Judges

ORDER

Upon consideration of the Motion of the Bankruptcy Trustee For Substitution of Parties and for Remand, the response thereto and of the reply, it is

ORDERED, by the Court, that the motion is denied. This matter has already been resolved by a Special Panel of the Court.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

APPENDIX E -- ORDER OF THE U.S.COURT OF APPEALS FOR THE D.C. CIRCUIT, FILED NOVEMBER 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1031 September Term, 1995

Mary V. Woodfork,
Appellant,

v.

Federal Communications Commission,
Appellee

and Consolidated Case 95-1655

BEFORE: Williams, Ginsburg and Randolph, Circuit Judges

O R D E R

Upon consideration of appellants' petition for rehearing filed November 1, 1995, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

APPENDIX F -- ORDER OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, FILED NOVEMBER 17, 1995

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-1031 September Term, 1995

Mary V. Woodfork,
Appellant,
v.
Federal Communications Commission,
Appellee

and Consolidated Case 95-1655

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

O R D E R

Upon consideration of appellants' Suggestion for Rehearing In Banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT: Mark J. Langer, Clerk

APPENDIX G -- INITIAL DECISION, FEBRUARY 24, 1983

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of **FCC 83D-13**

CREATION HOUSE RESEARCH INSTITUTE OF SCIENCE AND TECHNOLOGY, INC.
Los Angeles, California

File No.BPET-810928KG

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.
BC DOCKET NO. 82-191
Los Angeles, California
File No. BPET-811118KF

For Construction Permit

Appearances

Marshall G. Peters on behalf of Creation House Research Institute of Science and Technology, Inc.; and Booker T. Wade on behalf of Black Television Workshop of Los Angeles, Inc.

APPENDIX G

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: February 15; Released: February 24, 1983

Preliminary Statement

1. Two mutually-exclusive applicants remain in this proceeding. Creation House Research Institute of Science and Technology, Inc. (Creation House) and Black Television Workshop of Los Angeles, Inc. (Workshop) each seek authority to construct a new educational television broadcast station on Channel 68, Los Angeles, California

2. After the prehearing interlocutory cycle had been completed, only the following noncommercial comparative issue remained (FCC 82M-2032 released June 29, 1982):

5. To determine:

(a) the extent to which each applicant's proposed operation will be integrated into the over-all cultural and educational objectives of the respective applicants;
(b) the manner in which each applicant's proposed operation meets the needs of the Community to be served;
(c) whether the facts in the record

demonstrates that one applicant will provide a superior noncommercial broadcast service.

3. The prehearing conference was held on June 11, 1982, the hearing was held on November 8, 1982; and the record was closed on November 23, 1982 (FCC 82M-3709). Both applicants filed Proposed Findings of Fact and Conclusions of Law on January 10, 1983; but only Workshop filed Reply Findings on January 21, 1983.

Preliminary Ruling

4. Although Creation House exchanged what it captioned an "Affirmative Case", none of its exhibits were received into evidence (Tr. 44-69). So Creation House has defaulted on its comparative issue. It has failed to meet its burden of proceeding on that issue. Accordingly, no comparative findings can be made on Creation House's proposal.

5. On the other hand, Workshop has presented a full comparative case. It identified and offered 15 comparative exhibits into evidence. All of those exhibits, except for one, were fully received into evidence, and that one (Workshop Ex. 6) was partially received. Moreover Black Workshop's proposal was subjected to cross-examination (Tr. 114-175). So the following findings of fact on Black Workshop's proposal are in order.

APPENDIX G

Findings of Fact

Black Television Workshop of Los Angeles, California

6. Description. Black Television Workshop of Los Angeles, Inc. was incorporated on February 17, 1981 to provide quality educational television programming for the Los Angeles community. It's a non-profit corporation organized to operate a non-profit educational TV station in Los Angeles (Workshop Ex. 1; Workshop Ex. 15, pp. 1-2).

7. An eight-member Board of Directors governs the Workshop. All eight are Black Americans , and four of the eight are women. All of them are United States citizens. Seven of the eight currently reside within the station's proposed service area (Workshop Exs. 1 and 10).

8. One of the board members, Gary Cordell, will work at least 40 hours per week at the proposed station as the full-time General Manager (Workshop Ex. 9, p. 3). In addition the Workshop intends to organize four separate five-member advisory committees. Those committees will be made up of Los Angeles and service area residents. Those committees will advise on the following four topics: (1) promotion-syndications; (2) finance; (3) management; and (4) programming (Workshop Ex. 1, p. 2).

APPENDIX G

9. Other Media Interests. Black Workshop doesn't control or own any interests in any medium of mass communications. However, it has applied for a non-commercial television translator/low power station to operate on Channel 68 in Los Angeles (Workshop Ex. 11, p. 1).

10. Two of Workshop's Directors, Rosa Ware and Titilola Payne own Seattle Community Television (Seattle). Seattle has been granted a CP to operate a low power television at Flagstaff, Arizona. Ware is 98% owner of Seattle and Payne owns the other 2%. Titilola Payne also has a CP to operate a television translator/low power television station in Knoxville, Tennessee (Workshop Ex. 11, p. 1).

11. Workshop's Proposed Programming. Workshop proposes to broadcast from 7:00 a.m. to 11:30 p.m. every day; i.e., 115 1/2 hours per week. This will include a minimum of 30 hours per week of locally produced programming, 12 1/2 hours per week of news and public affairs, and 2 1/2 hours per week of instructional programming.

12. Its primary programming objective, however, is to promote the educational and cultural needs of minority broadcast viewers. More specifically, it intends to broadcast a specialized format of programming by and about Black Americans that isn't currently available to the 1 million Blacks in

APPENDIX G

the Los Angeles market. Workshop will broadcast Black Programming from a minimum of 30% of its broadcast time up to 65%.

13. To further that objective Black Workshop has designed a number of programs to promote the educational and cultural needs of minority broadcast viewers: The Black Church, Black Film Review, Mahogany Television Family Portrait, Quiet Storm, and Black Entrepreneur. In all Workshop presently Proposes 41 hours of Black programming per week.

14. In addition to its minority directed programming, Black Workshop intends to put on programming addressed to the needs of women and children, and a schedule of PBS programs. Its educational program will include training for area residents (i.e., college students) in the use of communications media to express and promote their interests and those of the community.

Ultimate Findings and Preliminary Conclusions

1. Black Television Workshop of Los Angeles, Inc.'s application will be granted, and Creation House Research Institute of Science and Technology, Inc.'s application will be denied.

2. Creation House has failed to present a viable comparative case. So there is nothing to compare

APPENDIX G

Black Workshop's proposal with. Black Workshop, on the other hand, has presented a proposal that will: (a) promote the educational and cultural needs of minority broadcast viewers; (b) present educational and informative programming directed to the non-minority (general) Los Angeles audience; (c) produce local programming that addresses the problems, needs, and interests of the Los Angeles co-unity; (d) provide quality children's programming; (e) inform and instruct and be a vehicle to better understanding between minority and non-minority Los Angeles residents; and (f) provide training in communications media for area residents.

Ultimate Conclusion

3. A grant of Black Workshop's application would serve the public interest. Its proposed non-profit operation will meet the needs of the Los Angeles community and provide a superior noncommercial broadcast service.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Black Television Workshop of Los Angeles, Inc.'s application (BPET-811118KF) IS GRANTED; and Creation House Research Institute of Science and Technology, Inc.'s application (BPET-810928KC) IS DENIED.

Walter C. Miller, Administrative Law Judge

APPENDIX H -- CHAPTER 7 NOTICE, U.S BANKRUPTCY COURT, CENTRAL DISTRICT OF CALIFORNIA, DATED FEBRUARY 23, 1995

United States Bankruptcy Court
Central District of California
255 East Temple Street, Los Angeles, CA 90012
NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7 OF THE BANKRUPTCY CODE, MEETING OF CREDITORS & FIXING OF DATES

(Corporation or Partnership. No Asset Case)

DEBTOR(S) INFORMATION: BANKRUPTCY
NO. SV94-45938-KL
BLACK TELEVISION WORKSHOP OF LA INC.
DATE FILED October 3, 1994
SSN: NA EIN: 94-7324567
ATTORNEY INFORMATION Pro Se
211 BRANNAN ST
SAN FRANCISCO, CA 94107

TRUSTEE INFORMATION:
MEETING OF CREDITORS, DATE, TIME AND LOCATION: ARNOLD KUPETZ, KUPETZ, SULMEYER, KUPETZ BAUMANN ETAL
10:00 A.M., March 31, 1995
300 S GRAND AVE, 14TH FLOOR
221 N. Figueroa St, Ste. 101, Los Angeles, CA 90012
LOS ANGELES, CA 90071 (213) 626-2311

APPENDIX H

At this time there appear to be NO ASSETS available from which payment may be made to unsecured creditors.
Do not file a proof of claim unless you receive a court notice to do so.

COMMENCEMENT OF CASE: A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the debtor named above, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts, are available for inspection at the office of the clerk of the bankruptcy court.

Dated: February 23, 1995.

For The Court, JON D. CERETTO, Clerk of Court

APPENDIX I -- FEDERAL BANKRUPTCY CODE

11 § 105

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

APPENDIX J -- FEDERAL BANKRUPTCY CODE

11 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5 (a) (3) of the Securities Investors Protection Act of 1970, operates as a stay, applicable to all entities, of-

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement

APPENDIX J

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay-

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

APPENDIX K -- COMMUNICATIONS ACT OF 1934

47 § 301

§ 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

(2) (3)

Nos. 95-1672 and 95-1881

In the Supreme Court of the United States

OCTOBER TERM, 1995

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, CONDITIONAL CROSS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM E. KENNARD
General Counsel

CHRISTOPHER J. WRIGHT
Deputy General Counsel

DAVID SILBERMAN
KAREN L. GULICK
Counsel
Federal Communications Commission
Washington, D.C. 20554

20pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Communications Commission's revocation of petitioners' construction permit was excepted from the automatic stay provision of the federal bankruptcy code as "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," 11 U.S.C. 362(b)(4).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Arminio, In re, 38 B.R. 472 (Bankr. D. Conn. 1984)	10
Board of Governors v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991)	10
Carlton Fruit Co., In re, 86 B.R. 254 (Bankr. M.D. Fla. 1988)	10
Commerce Oil Co., In re, 847 F.2d 291 (6th Cir. 1988)	13
Eddleman v. *United States Dep't of Labor*, 923 F.2d 782 (10th Cir. 1991)	8, 12
FCC v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940)	3
Fugazy Express, Inc., In re, 124 B.R. 426 (S.D.N.Y. 1991), appeal dismissed, 982 F.2d 769 (2d Cir. 1992)	13, 14
Missouri v. *United States Bankruptcy Court, In re*, 647 F.2d 768 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982)	9, 11
NLRB v. *Continental Hagen Corp.*, 932 F.2d 828 (9th Cir. 1991)	8, 11
NLRB v. *Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986)	9
Penn Terra Ltd. v. *Department of Envt'l Resources*, 733 F.2d 267 (3d Cir. 1984)	9, 12
Professional Sales Corp., In re, 56 B.R. 753 (N.D. Ill. 1985)	10

Cases—Continued: Page

Regents of Univ. Sys. of Georgia v. *Carroll*, 338 U.S. 586 (1950) 3, 9
Sam Daily Realty, Inc., In re, 57 B.R. 83 (Bankr. D. Haw. 1985) 10
Second Thursday Corp., 22 F.C.C.2d 515, recon. granted, 25 F.C.C.2d 112 (1970) 14
United States v. *Nicolet, Inc.*, 857 F.2d 202 (3d Cir. 1988) 8
Wade, In re, 948 F.2d 1122 (9th Cir. 1991) 10

Statutes, regulations and rule:

Bankruptcy Code, 11 U.S.C. 101 *et seq.* 3
11 U.S.C. 362(a) 3
11 U.S.C. 362(a)(1) 3
11 U.S.C. 362(a)(2) 3, 4
11 U.S.C. 362(a)(3) 10, 11
11 U.S.C. 362(b) 4
11 U.S.C. 362(b)(4) 4, 6, 7, 8, 9, 10, 11, 12
11 U.S.C. 362(b)(5) 4, 7, 9, 12
Communications Act of 1934, 47 U.S.C. 151 *et seq.* 2
47 U.S.C. 301 ..... 2, 3
47 U.S.C. 301-336 3
47 U.S.C. 307(a) 3, 9
47 U.S.C. 307(c) 3
47 U.S.C. 309(h) 3
47 U.S.C. 309(k) 3
47 U.S.C. 310(d) 3, 5
47 U.S.C. 312(a) 3
47 U.S.C. 319(a) 5
47 U.S.C. 319(c) 5
47 C.F.R. Pt. 73 3
Sup. Ct. Rule 13.4 15

Miscellaneous:

H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 4
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 8

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1672

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 95-1881

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, CONDITIONAL CROSS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 5a-8a) affirming the final order of the Federal Communications Commission (FCC) is unpublished, but the decision is noted at 70 F.3d 639 (Table).

The final order and decision of the FCC (95-1881 Cross-Pet. App. 59a-93a), revoking petitioners' construction permit and disqualifying cross-petitioners

as broadcast permittees or licensees, are reported at 8 F.C.C. Rcd. 4192. Orders of the FCC denying a petition for reconsideration (Cross-Pet. App. 94a-103a) and denying review (Cross-Pet. App. 108a-109a) are reported at 8 F.C.C. Rcd. 8719 and 9 F.C.C. Rcd. 4477, respectively. An order denying a second petition for reconsideration (Cross-Pet. App. 104a-107a) is unreported. The initial decision of the administrative law judge (Cross-Pet. App. 1a-58a) is reported at 7 F.C.C. Rcd. 7819.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1995. A petition for rehearing was denied on November 17, 1995. Pet. App. 10a. Petitioners filed a petition for a writ of certiorari on February 14, 1996, and by letter of the Clerk of the Court dated February 15, 1996, were granted leave to refile by April 15, 1996. The petition was refiled by that date and docketed on April 17, 1996 (No. 95-1672). Cross-petitioners filed a conditional cross-petition for a writ of certiorari on May 17, 1996 (No. 95-1881). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Communications Commission (FCC or Commission) exercises regulatory authority over the radio spectrum pursuant to the Communications Act of 1934, 47 U.S.C. 151 *et seq.* The Act charges the FCC with "maintain[ing] the control of the United States over all the channels of radio transmission" and "provid[ing] for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act further

provides that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." *Ibid.*; see *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.").

The grant of a license confers a limited right, and the FCC retains regulatory authority over the use of the license during the license term. Licensees are required to comply with restrictions set forth in Title III, Part I of the Act, 47 U.S.C. 301-336, and governing regulations, 47 C.F.R. Pt. 73. A license may be suspended, modified, or revoked for violation of those rules. 47 U.S.C. 312(a). Furthermore, transfer or assignment of the license during the license term, as well as renewal of the license, are subject to FCC approval. 47 U.S.C. 307(c), 309(h) and (k), 310(d). Section 307(a) directs the Commission to exercise its licensing authority in the "public convenience, interest, or necessity." 47 U.S.C. 307(a); see also *Regents of Univ. Sys. of Georgia* v. *Carroll*, 338 U.S. 586, 598 (1950).

2. The automatic stay provision of the Bankruptcy Code, 11 U.S.C. 101 *et seq.* (Code), provides for a broad stay of litigation, lien enforcement, and other actions that would interfere with the property of a debtor's estate. 11 U.S.C. 362(a). In particular, Section 362(a)(1) provides that the filing of a petition in bankruptcy operates as a stay of "the commencement or continuation * * * of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title." 11 U.S.C. 362(a)(1). Section 362(a)(2) stays "the enforcement,

against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title." 11 U.S.C. 362(a)(2). The purpose of the stay is twofold: to provide the debtor a "breathing spell" from his or her creditors, and to protect creditors from a race on the debtor's assets. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977).

The automatic stay is not absolute, however, and Congress has enumerated a series of exceptions in 11 U.S.C. 362(b). In particular, the filing of a petition in bankruptcy does not operate as a stay "under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(4). Likewise, the statute precludes a stay "under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(5). Together, those provisions permit a governmental body to commence, continue, and enforce an action against the debtor or his or her estate, where that governmental body is acting to protect its regulatory, rather than purely pecuniary, interests.

3. Petitioners in this case are Black Television Workshop of Los Angeles, Inc. (BTW), a non-profit corporation, and Arnold L. Kupetz, its trustee in bankruptcy. Conditional cross-petitioners have all served as officers and directors of BTW. In 1983, the FCC granted BTW a construction permit for

a noncommercial television station.[1] Several years later, three members of BTW's board of directors notified the FCC of a dispute over control of the corporation, and an FCC investigation revealed substantial questions concerning BTW's qualifications to be a permittee or licensee. After a lengthy hearing, an administrative law judge revoked BTW's construction permit, pending appeal. 95-1881 Cross-Pet. App. 1a-58a. The ALJ found, *inter alia*, that there had been an unauthorized transfer of control of BTW, in violation of 47 U.S.C. 310(d), and that BTW's initial applications and subsequent dealings with the Commission were "replete with instances" of misrepresentations and lack of candor. *Id.* at 47a-49a. On appeal, the Commission upheld the findings and conclusions of the ALJ. *Id.* at 59a-93a. A subsequent petition for reconsideration was denied, *id.* at 94a-103a, as were a further petition for reconsideration, *id.* at 104a-107a, and a self-styled application for review, *id.* at 108a-109a.

BTW sought review in the court of appeals and, on the same day, filed a petition in the bankruptcy court for reorganization under Chapter 11 of the Code. BTW then filed a motion for remand in the court of appeals, arguing that the automatic stay provision of the Code precluded the FCC from taking further action concerning the revocation of BTW's construction permit. In a brief, unpublished order, the court

---

[1] Pursuant to 47 U.S.C. 319(a), the FCC licensing process is initiated by the grant of a construction permit. Upon completion of the station within the time specified, and upon a showing that the permit's terms, conditions, and obligations have been satisfied, the Commission will grant the permittee a license in the public interest. 47 U.S.C. 319(c).

denied the motion, holding that "[t]he [FCC's] action is excepted from the automatic stay provisions of the bankruptcy code." Pet. App. 2a (citing 11 U.S.C. 362(b)(4)). BTW then filed a motion for rehearing and suggestion for rehearing *in banc* concerning the motion to remand, which the court of appeals denied. *Id.* at 4a. During this time, BTW's bankruptcy case was converted to a Chapter 7 liquidation proceeding, and Kupetz was appointed trustee.

After argument on the merits, the court of appeals affirmed the decision of the FCC in a brief, unpublished judgment, finding "ample evidence on the record to support the FCC's decisions." Pet. App. 6a-7a.[2] One month after the court entered its judgment, and eight months after his appointment in the bankruptcy case, Kupetz filed his first appearance in the court of appeals, seeking substitution of parties, vacatur of the court of appeals' judgment, and remand to the FCC to permit negotiation of a settlement. BTW also filed a petition for rehearing and suggestion for rehearing *in banc*. In unpublished orders, the court of appeals denied both Kupetz's motion and BTW's petition. *Id.* at 9a, 10a, 11a.

ARGUMENT

Petitioners' objections to the court of appeals' ruling lack merit. The court of appeals' decision is consistent with the rulings of this Court and is not in conflict with any decision of another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly concluded that "[t]he [FCC's] action is excepted from the automatic

---

[2] The court did not revisit its earlier ruling on the non-applicability of the automatic stay.

stay provisions of the bankruptcy code." Pet. App. 2a (citing 11 U.S.C. 362(b)(4)). Section 362(b)(4) provides that the automatic stay does not apply to the commencement or continuation of a proceeding by a governmental unit to enforce its police or regulatory power. 11 U.S.C. 362(b)(4).

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978).

Section 362(b)(5) works in tandem with Section 362(b)(4), to permit entry of all judgments and enforcement of all non-monetary judgments obtained under Section 362(b)(4).

> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it pref-

> erential treatment to the detriment of all other creditors.

S. Rep. No. 989, *supra*, at 52.

Courts have applied two tests, the "pecuniary purpose test" and the "public policy test," to determine whether particular governmental actions are entitled to the regulatory powers exception to the automatic stay provision. The pecuniary purpose test asks whether the governmental action relates primarily to matters of the public interest, health, and safety, or rather merely to the protection of the government's pecuniary interest in the debtor's property. See, *e.g.*, *NLRB* v. *Continental Hagen Corp.*, 932 F.2d 828, 833 (9th Cir. 1991); *Eddleman* v. *United States Dep't of Labor*, 923 F.2d 782, 790 (10th Cir. 1991); *United States* v. *Nicolet, Inc.*, 857 F.2d 202, 209 (3d Cir. 1988). The public policy test distinguishes between governmental proceedings that aim to effectuate public policy and those that adjudicate private rights. *Continental Hagen*, 932 F.2d at 833; *Eddleman*, 923 F.2d at 790; *Nicolet*, 857 F.2d at 209. Both tests aim at discerning whether the governmental unit is acting in a regulatory capacity—to effect compliance with laws that it administers—or in a pecuniary or "private" capacity—to recover money owed it as a creditor.

Only in the latter case does the governmental unit stand in the position of any other creditor, such that its efforts to obtain a monetary judgment will be subject to the stay. By contrast, in the former case the action will fall squarely within the exception carved out by Section 362(b)(4). See *Continental Hagen*, *supra* (since enforcement of unfair labor practice laws satisfies both tests and is excepted from

stay, entry of cease and desist order and monetary relief permissible, though enforcement of monetary relief stayed); *NLRB* v. *Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986) (unfair labor-practice proceeding excepted from stay); *Penn Terra Ltd.* v. *Department of Envt'l Resources*, 733 F.2d 267 (3d Cir. 1984) (enforcement of state environmental protection statute excepted from stay); *In re Missouri* v. *United States Bankruptcy Court*, 647 F.2d 768 (8th Cir. 1981) (enforcement of State's grain laws, where primarily related to protection of State's pecuniary interest in debtor's property, not excepted from stay), cert. denied, 454 U.S. 1162 (1982).

The court of appeals here correctly applied the plain language of the statute, which exempts actions involving a "governmental unit's police or regulatory power[s]" from the automatic stay. 11 U.S.C. 362(b)(4) and (5). As this Court has recognized, "the Commission's regulatory powers center around the grant of licenses." *Carroll*, 338 U.S. at 599. The Commission is directed to exercise that power in the "public convenience, interest, [and] necessity." 47 U.S.C. 307(a); see *Carroll*, 338 U.S. at 598. When the Commission acts to enforce compliance with its governing statute and regulations, and to assure use of the radio spectrum in the public interest, it acts to protect its regulatory, rather than pecuniary, interests. The FCC's action revoking BTW's construction permit was purely regulatory in nature, and thus is exempt from the stay.

The judgment of the court of appeals is also consistent with interpretations of the governmental regulatory powers exception made by other federal courts. In many analogous contexts, courts have held that various license revocation-type actions fall

within the governmental regulatory powers exception to the automatic stay. See, *e.g.*, *In re Wade*, 948 F.2d 1122 (9th Cir. 1991) (disciplinary proceedings against attorney excepted from automatic stay); *In re Professional Sales Corp.*, 56 B.R. 753 (N.D. Ill. 1985) (revocation of status permit for operation of hazardous waste site excepted from stay); *In re Carlton Fruit Co.*, 86 B.R. 254 (Bankr. M.D. Fla. 1988) (imposition of conditions upon citrus dealer's license excepted from automatic stay); *In re Sam Daily Realty, Inc.*, 57 B.R. 83 (Bankr. D. Haw. 1985) (suspension of realtor's license and imposition of judgment of fine excepted from automatic stay; enforcement of payment of fine subject to stay); *In re Arminio*, 38 B.R. 472 (Bankr. D. Conn. 1984) (revocation of driver's license excepted from automatic stay).[3]

---

[3] This Court's decision in *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), is not to the contrary. *MCorp* held that administrative proceedings by the Board of Governors of the Federal Reserve to enforce regulations concerning the operation of bank holding companies are excepted from the automatic stay under Section 362(b)(4). In its argument, MCorp had contended that the "ultimate objective" of the proceedings was to "exercise control of corporate assets." *Id.* at 40. Hence, MCorp asserted, Section 362(a)(3), staying any act to obtain possession of, or to exercise control over, property of the estate, precluded continuation of the administrative proceedings.

This Court ruled that Section 362(b)(4) clearly permitted the government to continue its enforcement proceedings. The Court stated that "[i]t is possible, of course, that the Board proceedings * * * may conclude with the entry of an order that will affect the Bankruptcy Court's control over the property of the estate." 502 U.S. at 41. The Court suggested that "[i]f and when" an order were entered interfering with

b. Despite the clear language of the statute, petitioners argue (Pet. 8-9) that a stay of any FCC revocation proceeding against a federal bankruptcy debtor is necessary "to protect creditors." In particular, petitioners assert (Pet. 9-10) that Section 362(b)(4)'s reference to "police or regulatory power" encompasses "enforcement of laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with control of the *res* or property by the bankruptcy court." That argument lacks merit.

Petitioners' argument is not supported by *In re Missouri* v. *United States Bankruptcy Court*, *supra*. That case addressed the ability of the State to seize and sell grain in the possession of the debtor. The court of appeals found that the grain laws that the State sought to enforce were "*primarily relate[d] to the protection of the pecuniary interest* in the debtors' property and not to matters of public safety or health." 647 F.2d at 776 (emphasis added). The court's general statement concerning "regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court," *ibid.*, thus has no bearing upon a case such as the instant one in which a substantial non-pecuniary regulatory interest is found to exist.

Petitioners also invoke (Pet. 12) *NLRB* v. *Continental Hagen Corp.*, *supra*, to bolster their

---

the property of the estate in violation of Section 362(a)(3), "then it may well be proper" for the bankruptcy court to exercise concurrent jurisdiction. Petitioners' claim (Pet. 13)—that any final agency action "adversely affecting the license of [a] regulated business" may require a stay—does not follow from *MCorp*, which neither concerned a license revocation proceeding nor addressed the statutory provisions at issue here.

claim that a regulatory action must be stayed if enforcement "would be detrimental to creditors." That case does not support that proposition. Rather, *Continental Hagen* illustrates the distinction between the government as regulator and the government as creditor. The court of appeals recognized the authority of the NLRB to enforce its unfair labor practice laws, not only through the issuance of cease and desist orders, but also by ordering monetary relief. Noting, however, that *enforcement* of the monetary relief would be stayed—a proposition not contested by the government—the court of appeals relied upon the monetary judgment limitation of 11 U.S.C. 362(b)(5). Despite petitioners' assertion to the contrary (Pet. 12), the court made no reference to any generalized prohibition against enforcement where enforcing a judgment would be "detrimental to creditors."

Indeed, no court of appeals has ruled that the Code stays regulatory action otherwise permitted by the plain language of Section 362(b)(4) and (5) merely because of a "detrimental effect" upon creditors. The courts have acknowledged that, although the goal of preserving the corpus of the debtor's funds and estate is normally central to the statutory scheme, that policy may conflict with other important governmental goals. See, *e.g.*, *Eddleman*, 923 F.2d at 790 ("We must assume that Congress chose its language [in Section 362(b)(4)] with the full recognition that the exception would allow governmental actions to encroach on the court's control of debtors' affairs."). "In enacting the exceptions to section 362, Congress recognized that in some circumstances, bankruptcy policy must yield to higher priorities." *Penn Terra*, 733 F.2d at 278 (rejecting argument that State could

not enforce its environmental laws against debtor where compliance with injunction required expenditure of money to detriment of creditors); see also *In re Commerce Oil Co.*, 847 F.2d 291, 297 (6th Cir. 1988) ("[W]e decline to adopt [the] premise that preservation of the debtor's estate is of greater priority in the statutory scheme set forth by Congress in Title 11 than is the enforcement of environmental protection laws explicitly intended to be excepted from the automatic stay."). As the courts have recognized, despite the possibility of indirect effects upon creditors, Congress chose to establish express exceptions to the automatic stay.

2. a. Petitioners suggest (Pet. 9-11) that the opinion of the court of appeals is in conflict with a decision of a district court. However, the proposition cited by petitioners is contained in dicta, and any "conflict" created by the dicta of a district court does not warrant review by this Court.

In re Fugazy Express, Inc., 124 B.R. 426 (S.D.N.Y. 1991), appeal dismissed, 982 F.2d 769 (2d Cir. 1992), involved proceedings by a purchaser of an FCC license at an authorized trustee's sale against an unauthorized, but earlier, post-petition transferee. Not aware of the bankruptcy proceedings, the FCC had approved the first assignment of the license. Deciding who controlled the debtor's interest in the license post-petition, the district court acknowledged two critical facts: (1) any interest in the license was limited by the regulatory authority of the FCC, and (2) on the facts of the case, the question of the application of the stay provisions to regulatory proceedings by the FCC was not before the court. 124 B.R. at 431.

The court nevertheless asserted that "[t]he revocation of a license by the FCC does not affect the health or safety of the public, so there is no exemption to the stay under [Section 362(b)(4)]." 124 B.R. at 431. In light of the district court's express recognition that the applicability of the stay provisions to FCC regulatory proceedings was not before it, this statement is sheer obiter dicta. *Fugazy* thus has no bearing in fact or law on the question presented in this case.

b. Petitioners also argue that the decision of the court of appeals conflicts with FCC policy, as previously upheld by the court of appeals. Petitioners cite (Pet. 11) *Second Thursday Corp.*, 22 F.C.C.2d 515, recon. granted, 25 F.C.C.2d 112 (1970), for the proposition that the FCC must concur with a stay and defer to the bankruptcy court in order to protect creditors. *Second Thursday* is inapposite.

That case involved an application, by the licensee's trustee in bankruptcy, for assignment of the license to a bidder at auction, where allegations of wrongdoing had been made against the licensee but no adjudication had yet occurred. In such circumstances, where a proposed assignment is pending and claims against the licensee have not been adjudicated, the Commission has found that protecting innocent creditors is one factor to consider in approving the assignment, so long as the alleged wrongdoers would receive no benefit from the FCC's action. *Second Thursday* does not stand for the proposition that the FCC will stay all regulatory enforcement action against a licensee merely because the licensee has entered bankruptcy. Where wrongdoing has been clearly established and finally adjudicated, the FCC has a strong interest in assuring enforcement of its

governing statute and regulations in order to protect the public interest committed to the agency's charge.

3. Because the petition for a writ of certiorari should be denied for the foregoing reasons, this Court's Rule 13.4 requires that the conditional cross-petition also be denied.[4]

CONCLUSION

The petition and conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM E. KENNARD
General Counsel

CHRISTOPHER J. WRIGHT
Deputy General Counsel

DAVID SILBERMAN
KAREN L. GULICK
Counsel
Federal Communications Commission

MAY 1996

---

[4] In any event, we note that the conditional cross-petition attempts to relitigate the facts of the construction permit revocation proceeding. Cross-petitioners' contentions were addressed in the initial decision of the administrative law judge, Cross-Pet. App. 1a-58a, and the decision of the full Commission, *id.* at 59a-93a, and the court of appeals correctly found "ample evidence on the record" to support the FCC's decisions, Pet. App. 6a-7a. None of cross-petitioners' fact-bound claims would warrant review by this Court.

Supreme Court, U.S.
FILED
JUN 20 1996
OFFICE OF THE CLERK

(3) (H)

Case Nos. 95-1672 and 95-1881

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ROSA WARE, BOOKER T. WADE, JR.,
GWENDOLYN MAY-BARLOW, AND HOPE SMITH
BYNUM, Joint Cross-Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

JOINT REPLY BRIEF OF CONDITIONAL CROSS-PETITIONERS FOR A WRIT OF CERTIORARI

Stephen T. Yelverton, Esq.
Counsel of Record
Yelverton Law Firm, P.C.
1101 30th St., N.W.,
Suite 500
Washington, D.C. 20007
Tel. 202-625-4321

10 pp

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

CROSS-PETITIONERS' REPLY BRIEF 1

I. The Court Should Grant the Petition of Black Television Workshop in Order to Resolve the Issue of the Applicability of the Automatic Stay Provisions of 11 U.S.C. 362 (a) of the Federal Bankruptcy Code to FCC License Revocation Actions.. 1

II. The Court Should Grant the Conditional Cross-Petition Because the Respondents Failed to Respond to the "Denial of Due Process" Issues which were Raised by Ware, Wade, May-Barlow, and Bynum 4

CONCLUSIONS 7

TABLE OF AUTHORITIES

Page(s)

Federal Communications Commission Decisions

O.D.T. International, 9 FCC Rcd 2575 (1994) 4

Second Thursday Corp., 25 FCC2d 112 (1970) 3

Court Decisions

Board of Governors of the Federal Reserve System of the U.S. v. MCorp Financial, Inc., 502 U.S. 32 (1991) 2-3

LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974) 3

L.B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948) 4

Statutes

11 U.S.C. 362 1-3

Federal Rules

Supreme Court Rule 15 5

Federal Rules of Evidence, Rule 615 5

CROSS-PETITIONERS' REPLY BRIEF

Cross-Petitioners' Rosa Ware, Booker T. Wade, Jr., Gwendolyn May-Barlow, and Hope Smith Bynum, hereby submit their reply to the brief in opposition filed by the Respondents' Solicitor General and the Federal Communications Commission ("FCC").

The arguments of the Respondents show why the Court should grant the petition of Black Television Workshop of Los Angeles, Inc. and the related conditional cross-petition. Rather than directly address the key issues and cases raised by the petition and the conditional cross-petition, the Respondents obfuscate these key issues and cases in footnotes, or just simply ignore them.

I. The Court Should Grant the Petition of Black Television Workshop in Order to Resolve the Issue of the Applicability of the Automatic Stay Provisions of 11 U.S.C. 362 (a) of the Federal Bankruptcy Code to FCC License Revocation Actions.

The Respondents, at p. 15, of their brief in opposition contend that, because the petition of Black Television Workshop should be denied, the conditional cross-petition is required to be denied. However, the Court should grant the petition of Black Television Workshop in order to resolve the issue of the applicability of the automatic stay provisions of 11 U.S.C. 362 (a) of the Federal Bankruptcy Code to FCC license revocation actions.

This is an important Federal question of law. It deserves resolution by the Court because of the substantial impact of bankruptcy proceedings on the nation's

broadcasting industry and other Federally regulated businesses.

The key case governing resolution of the petition of Black Television Workshop is Board of Governors of the Federal Reserve System of the U.S. v. MCorp Financial, Inc., 502 U.S. 32 (1991). Therein, the Court addressed the issue of the applicability of the automatic stay provisions of 11 U.S.C. 362 (a) to an ongoing non-final administrative agency enforcement proceeding.

The Court held that the automatic stay did not apply to such ongoing non-final enforcement proceedings. However, the Court did state that if and when the agency's proceedings culminate in a final order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction in order to protect the property of the debtor estate. MCorp, 502 U.S. at 41-42.

In the case of Black Television Workshop, its license revocation is a final order of the FCC and is on judicial appeal. This is exactly the circumstance that the Court indicated would be subject to the automatic stay provisions of 11 U.S.C. 362 (a). Accordingly, the Court should grant certiorari in order to definitively resolve this important matter.

The protestations of the Respondents, at n. 3, that the MCorp decision is somehow not relevant to the circumstance of Black Television Workshop only underscores the need to grant certiorari. The Respondents erroneously contend that MCorp is not relevant because it did not

concern a license revocation proceeding, nor address the statutory provisions at issue here.

However, the Respondents ignore the fact that MCorp concerned an enforcement action against a Federally chartered bank and that the enforcement action had the potential to result in revocation of the bank charter, which is a Federal license. Moreover, the Respondents ignore the fact that the applicability of 11 U.S.C. 362 was squarely put into issue in MCorp and addressed by the Court. Id., 502 U.S. at 34-36 and 39-41.

The Respondents, at pp. 14-15, contend that the FCC is not required under its policies in Second Thursday Corp., 25 FCC2d 112 (1970), to stay all enforcement actions against a licensee merely because it has entered into bankruptcy. However, this is not the issue raised by the Petitioner.

The issue raised by the Petitioner is the FCC being required by a Federal Bankruptcy Court to stay a final order of revocation, not an ongoing enforcement proceeding. After the stay is entered, the FCC must then reconcile its revocation order with Federal bankruptcy policies protecting creditors. LaRose v. FCC, 494 F.2d 1145, 1150 (D.C. Cir. 1974). If the FCC is unable to reconcile its revocation order with Federal bankruptcy policies, then the Federal courts would resolve that issue on appeal. However, such issue is not now before this Court.

The Respondents fail to even acknowledge in their brief LaRose v. FCC, which requires the FCC to reconcile its policies, including revocation orders, with Federal

bankruptcy policies protecting creditors. This omission underscores why certiorari should be granted. The Respondents merely ignore key cases that contradict their arguments.

The Respondents, at pp. 3, 9, 11, and 13, suggest that an FCC license is not "property" of the debtor estate which would be subject to the jurisdiction of a Federal Bankruptcy Court. However, an FCC license is a "thing" of value and becomes property of the debtor estate at the time of filing the bankruptcy petition. L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C. Cir. 1948). The FCC has heretofore recognized the jurisdiction of Federal Bankruptcy Courts over licenses as property of the debtor estate. O.D.T. International, 9 FCC Rcd 2575, 2576, para. 7 (1994).

Accordingly, the petition for writ of certiorari of Black Television Workshop raises important Federal questions of law requiring resolution by the Court, which the Respondents have either ignored or obfuscated in their brief. Thus, the petition should be granted.

II. The Court Should Grant the Conditional Cross-Petition Because the Respondents Fail to Respond to the "Denial of Due Process" Issues which were Raised by Ware, Wade, May-Barlow, and Bynum.

In their joint conditional cross-petition, Ware, Wade, May-Barlow, and Bynum raise important issues of Federal law as to denial of "due process" by the FCC. However, in their opposition brief, the Respondents fail to address or even

to acknowledge these issues and the matters raised therein.

Pursuant to Supreme Court Rule 15 (2), a brief in opposition should address any perceived misstatements of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted. Any objection to consideration of a question presented based on what occurred in the proceedings below may be deemed waived, unless called to the Court's attention in the brief in opposition.

Accordingly, by not responding to or even acknowledging the denial of "due process" issues raised by the Cross-Petitioners, the Respondents' have waived any factual or legal objections they might have made disputing that the Cross-Petitioners were denied "due process" by the FCC. This failure to respond supports grant of certiorari.

In their opposition brief, at. n. 4, the Respondents merely refer to the joint conditional cross-petition as too "fact-bound" to warrant review by the Court because it attempts to relitigate the facts of the FCC proceeding. However, the joint conditional cross-petition clearly and succinctly raises six separate legal issues as to denial of "due process" by the FCC.

These issues are:

(1) Whether Rosa Ware was denied "due process" by the FCC's violation of Rule 615 (1) of the Federal Rules of Evidence in sequestering her from adverse witnesses?

(2) Whether Rosa Ware, Gwendolyn May-Barlow, and Hope Smith Bynum were denied "due process" by the FCC's attribution to them of purported disqualifying misconduct by Booker T. Wade, Jr.?

(3) Whether the Cross-Petitioners were denied "due process" by the FCC's failure to use the required "preponderance of [substantial] evidence" standard in determining disqualifying misconduct?

(4) Whether Booker T. Wade, Jr. was denied "due process" by the FCC's disqualification of him based upon allegations in which he had no notice?

(5) Whether Booker T. Wade, Jr. was denied "due process" by the FCC's disqualification of him based upon supposed representations by him which are not in the record?

(6) Whether the Cross-Petitioners were denied "due process" by the FCC's disqualification of them based upon a violation of a supposed FCC policy which does not exist?

These are legal issues, not a relitigation of the facts of the case. Moreover, these legal issues raise important questions of Federal law requiring resolution by the Court.

The FCC is the "gatekeeper" as to who is allowed to own or control broadcast stations, which are the most important medium of mass communications in this country. Its decisions as to who is qualified or not qualified to own or

control broadcast stations --- and thus be a trustee of a valuable public resource --- must be above reproach and must be in accordance with fundamental notions of fairness and "due process." Otherwise, the American people will have no confidence in the FCC's decision making process.

Accordingly, the joint conditional cross-petition for writ of certiorari of Ware, Wade, May-Barlow, and Bynum raises important questions of Federal law requiring resolution by the Court, which the Respondents have ignored. Thus, the joint conditional cross-petition should be granted.

Conclusions

WHEREFORE, in view of the foregoing, the petitions should be granted.

Respectfully submitted,

By:_____

Stephen T. Yelverton, Esq.
Counsel of Record for Rosa Ware,
Booker T. Wade, Jr., Gwendolyn
May-Barlow and Hope Smith Bynum

1101 30th St., N.W., Suite 500
Washington, D.C. 20007
Tel. 202-625-4321

June 20, 1996

Supreme Court, U.S.
FILED
JUN 20 1996
CLERK

(4) (5)

Nos. 95-1672 and 95-1881

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, CONDITIONAL CROSS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

Peter Tannenwald, Esq.
Counsel of Record
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Ave., N.W., Suite 200
Washington, DC 20036-3101
202-728-0400

RECEIVED
SUPREME COURT, U.S.
CLERK'S OFFICE
JUN 20 P 3:58

10 pp

TABLE OF CONTENTS

Argument 1

The Enforcement Power of the FCC Has Already Been Exercised in This Case and Will Not Be Undermined by a Grant of Relief. 2

The Grant of Relief in This Case Will Not Result in the Creation of a Private Property Interest in a License and Need Not Generate Any Benefit for BTW or Its Principals. 4

Respondents Have Misapplied Case Law and Have Improperly Distinguished Cases cited by Petitioner. 5

The FCC Has Previously Recognized Property Interests in the Disposition of a License and Granted Other Relief To Protect Creditors in a Bankruptcy Context. 6

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Board of Governors of the Federal Reserve System of the U.S. v. McCorp Financial, 592 U.S. 32 (1991) 6

Diamond Broadcasting of California, Inc., FCC 96-245 (slip op.), released June 17, 1996 . . . . . 6, 7

LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974) 5

In re Ridgley, 139 B.R. 374 (Bkrtcy. D. Md. 1992) 6

Second Thursday Corporation, 22 FCC 2d 515 (1970), *recon. granted*, 25 FCC 2d 112 (1970) 2, 4

Tak Communications, 985 F.2d 916 (7 Cir. 1993) 6

Walter O. Cheskey, 9 FCC Rcd. 986 (Common Carrier Bur., 1994) 6, 7

Statutes:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*
11 U.S.C. Sec. 362(a) 1
11 U.S.C. Sec. 362(b)(4) 1

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 95-1672

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 95-1881

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, CONDITIONAL CROSS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

The Respondents have taken the position that the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. Sec. 362(a), do not apply here, because the FCC is enforcing its police or regulatory power, so its action

comes within the exceptions to the stay provisions in 11 U.S.C. Sec. 362(b)(4). However, Respondents mischaracterize the character of the relief Petitioner seeks and in so doing miss the point of the Petition for a Writ of *Certiorari* ("Petition"). Their erroneous approach highlights the violence that the FCC has done to established bankruptcy principles mandated by both Congress and the courts and underscores why an important federal question is at stake that requires disposition by this Court.

The Enforcement Power of the FCC Has Already Been Exercised in This Case and Will Not Be Undermined by a Grant of Relief.

The basic point of the Petition is that the enforcement power of the FCC has already been exercised in this case; and granting the relief requested by the Petitioner, a Trustee in Bankruptcy, under *Second Thursday Corporation*, 22 FCC 2d 515 (1970), *recon. granted*, 25 FCC 2d 112 (1970), will not undermine that exercise of power or undo any action the Commission has taken to protect the public interest. The FCC found that Black Television Workshop of Los Angeles, Inc. ("BTW") is not qualified to operate KEEF-TV in Los Angeles. If this case is remanded to the FCC for disposition consistent with bankruptcy law, it will not result in BTW operating KEEF-TV or holding any FCC authorization.

There are various ways in which the FCC may deal with the estate of the debtor on remand. However, the cardinal principal under *Second Thursday* is that those who have been found by the FCC to be unqualified shall receive no benefit from the ultimate disposition of the authorization. Only innocent creditors may benefit, and the FCC decides who is or is not "innocent." Thus under *Second Thursday*, (a) BTW cannot end up holding a license

or operating the television station, and (b) none of the principals of BTW whose actions led to revocation by the FCC may receive any financial benefit from the ultimate disposition of the authorization.[1] The Trustee does not quarrel with that result.

In other words, the only people who have anything at stake at this point are the innocent creditors of BTW, who stand to lose millions of dollars and whose interests have been wrongly ignored by the FCC. These creditors did nothing wrong, so there is nothing to be enforced against them. Thus no interest of the Government in preserving its enforcement powers is at stake.[2]

The bankruptcy laws have two important purposes. One is to relieve debtors of some of the consequences which might otherwise result from their inability to pay their debts -- to give them a "breathing spell."[3] The other is to salvage something for creditors from the debtor's estate. The Respondents are acting in violation of the intent of Congress with respect to innocent creditors, without the countervailing public policy considerations that the Respondents argue exist, because no one is seeking restoration of the license for KEEF-TV to either BTW or its principals. This Court must not permit such a result.

---

[1] Even if the Conditional Cross-Petition for a Writ of *Certiorari* ("Cross-Petition") by Rosa Ware *et al.* is granted, neither BTW or its principals will hold the license or operate KEEF-TV, as the Cross-Petitioners do not seek that relief. Cross-Petition at p. 12.

[2] How value may be realized from the property of the bankruptcy estate without BTW or its principals holding a license or operating the television station is discussed *infra*.

[3] *See* legislative history cited in Respondents' Brief in Opposition at p. 4.

The Grant of Relief in This Case Will Not Result in the Creation of a Private Property Interest in a License and Need Not Generate Any Benefit for BTW or Its Principals.

A secondary aspect of the Respondents' argument is that there is no estate of the debtor that can yield funds for the benefit of creditors, because recognizing such an estate would violate the principle that no one may have a property interest in an FCC license. It is not necessary to find that the debtor has a private property interest in its authorization that can be asserted against the Government generally, in violation of 47 U.S.C. Sec. 301, for the Court to find that the FCC has violated important bankruptcy law precepts in this case. Moreover, as discussed *infra*, the there are many situations in which certain limited property interests in broadcasting stations have been recognized without violating 47 U.S.C. Sec. 301.

Substantial funds may be realized from the bankruptcy estate (a) without giving anything to BTW or its principals, and thus without recognizing any general property interest of theirs, and (b) indeed even without ever establishing the television station that BTW sought to build in Los Angeles. For example, the authorization for KEEF-TV may be assigned to a completely new party, in which neither BTW nor its principals have any interest, in return for a cash payment to the bankruptcy court to be distributed exclusively to innocent, FCC-approved creditors. Alternatively, it is even possible to obtain cash from a third party in return simply for exchanging frequencies with BTW (again subject to FCC approval) thereby transferring only BTW's frequency to a third party while deleting the KEEF-TV station authorization altogether.

The Court need not dictate which result obtains. The point is that Respondents have ignored all the possibilities in refusing to accept a *Second Thursday*

disposition. In other words, the only issue in this case arising from the Trustee's Petition is whether or not innocent creditors should be deprived of any recovery at all, not whether BTW or its principals should recover anything or be granted any property interest or whether the FCC's findings against them should be vacated. Thus a fundamental precept of the bankruptcy law is being violated without any offsetting benefit or the creation of any property right with adverse consequences in other contexts.

Respondents Have Misapplied Case Law and Have Improperly Distinguished Cases cited by Petitioner.

The cases cited by Respondents do not support their arguments, because their arguments are based on a faulty perception of the legal nature of the relief sought by the Petitioner/Trustee. Respondents further ignore, and fail to distinguish, the teaching of *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974), which indicates that the FCC is in fact legally bound to consider the rights of creditors under federal bankruptcy law, something it has failed to do here. When the facts are put in perspective, and it is understood that the FCC's disqualification findings against BTW and its principals need not be vacated or undermined for relief to be granted here,[4] BTW may remain disqualified, and the FCC's regulatory laws and regulations will remain fully enforced. However, purely innocent parties will receive at least some relief. Therefore, the decisions cited by

---

[4] *La Rose* involved a situation similar to the instant one, where a licensee and its principals were found disqualified, but court-ordered relief was still provided for creditors without undermining the importance or precedential effect of the FCC's findings and conclusions in the case. Moreover, as is the case here, the court intervened after the FCC had completed its proceedings and rendered an adverse decision against the licensee.

Petitioner are relevant, and Respondents' attempt to distinguish them based on an argument that the FCC's enforcement power would be undermined are faulty.

Respondents' attempt to distinguish *Board of Governors of the Federal Reserve System of the U.S. v. McCorp Financial*, 592 U.S. 32 (1991) in a footnote, based on the fact that a different regulatory statute is involved, is unavailing. The direct parallel with *MCorp* would be the question of whether a bankruptcy court could stay the FCC's hearing on the revocation of BTW's construction permit if that hearing were still in progress. But the hearing has been completed, so that issue is not before the Court. All that is left is the question of whether economic value for the benefit of creditors may be realized from the bankruptcy estate, which is exactly where the Court in *MCorp* said that judicial intervention may be required and where the Court said that the bankruptcy court has jurisdiction.

The FCC Has Previously Recognized Property Interests in the Disposition of a License and Granted Other Relief To Protect Creditors in a Bankruptcy Context.

It must be noted that the FCC is acting inconsistently with its own precedents, as it has recognized that creditors may have a property interest in the proceeds of disposition of a license, even if they may not take a direct security or other property interest in the license itself. In so holding, the FCC has specifically recognized and discussed the kind of conflict among bankruptcy courts that Petitioner seeks to have the Court resolve here. *Walter O. Cheskey*, 9 FCC Rcd. 986 (Common Carrier Bur., 1994) (FCC endorses *In re Ridgely*, 139 B.R. 374 (Bkrtcy. D. Md. 1992) and rejects *Tak Communications*, 985 F.2d 916 (7 Cir. 1993)).

Further, in *Diamond Broadcasting of California, Inc.*, FCC 96-245 (slip op.), released June 17, 1996, the

Commission rescinded a forfeiture against a broadcast licensee where the license had been assigned to a receiver in bankruptcy, because "the imposition of a forfeiture in this case would impact only innocent creditors."

The FCC's recognition of creditor expectations in *Cheskey* and *Diamond*, especially where, as here, there is no impairment of the agency's enforcement power, contrasts with its disregard of the position of the Trustee and creditors in this case and significantly undermines the Respondents' position.

CONCLUSION

In light of the foregoing, it is respectfully submitted that important federal questions are presented in this case, the bankruptcy laws have been wrongly undermined by the proceedings below, there are circuit court decisions in Petitioners' favor, and prior law requires clarification and consistency which only this Court can provide. Therefore, *Certiorari* should be granted.

Respectfully submitted,

PETER TANNENWALD
Counsel of Record

June 1996